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JURISDICTIONAL STATEMENT

Appellants, heirs of Joseph B. Kimbrough, D.D.S., brought suit for declaratory judgment and construction of his inter vivos trust. Dr. Kimbrough's Trust provided Appellants' parents with income for life from the trust corpus, and made provisions for encroachments and advancements, and then to "Washington University, St. Louis, Missouri, for the exclusive use and benefit of its Dental Alumni Development Fund." The documented purpose of the Dental Alumni Development Fund was for the continued operation of the Dental School and for its prestige. Washington University permanently closed the Dental School in 1991.

The Honorable Timothy J. Wilson of the 22nd Judicial Circuit, after finding the terms of Dr. Kimbrough's charitable trust were impracticable or impossible to fulfill, entered judgment on July 17, 2002, redirecting the trust proceeds to Washington University, concluding that Dr. Kimbrough established his inter vivos trust with a general charitable intent and applying the *cy pres* doctrine.

Appellants appealed this decision to the Eastern District of the Appellate Court, and the three-judge panel, with the Honorable George W. Draper III presiding, unanimously reversed the decision of Judge Wilson, concluding that the intent of Dr. Kimbrough in the formation of the trust was specific, and that the proceeds should go to the appellants, as heirs.

After the Appellate Court denied Respondent Washington University's Application for Transfer to this Court on October 2, 2003, Respondent Washington University filed

its Application for Transfer with this Court and said Application for Transfer was granted on November 25, 2003.

Accordingly, jurisdiction is proper in this Court pursuant to Article V, Section 3 of the Constitution of the State of Missouri.

STANDARD OF REVIEW

In reviewing suits of an equitable nature, the "judgment of the trial court will be sustained by the Court of Appeals unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." Murphy v. Caron, 536 S.W.2d 30 (Mo. banc 1976). This Court owes no deference to the trial court's judgment in a case where the sole question is the construction of documents based upon the language they employ. Estate of Boder v. Albrecht Art Museum, 850 S.W.2d 76, 79 (Mo. banc 1993). In review of court tried cases, the appellate court makes an independent evaluation of the conclusions of law that the trial court draws from its factual findings. Porter v. Falknor, 895 S.W.2d 187, 189 (Mo. App. E.D. 1988). Where the law has been erroneously applied and the evidence is not controverted, no deference is due the trial court's judgment. Bremen Bank and Trust Company of St. Louis v. Muskopf, 817 S.W.2d 602, 604 (Mo. App. E.D. 1991).

STATEMENT OF FACTS

THE PARTIES

The Appellants are Louise Obermeyer [Louise] and Elizabeth Salmon [Elizabeth] who are cousins and great nieces of Joseph B. Kimbrough, D.D.S. [Dr. Kimbrough]. (L.F. at 21.) Dr. Kimbrough established a trust that named Louise's mother, Margaret Salmon Derrick [Margaret], and Elizabeth's father, Harvey Salmon [Harvey], as life income beneficiaries, with provisions for encroachments and advancements. (Ex. 1) Harvey died in 1980 and Margaret died in 2000. (Tr. at 58, Ex. 6.) After Margaret's death, Louise and Elizabeth filed the lawsuit in this case, stating that the trust should revert to them as heirs or to Louise as personal representative of Margaret's estate. (L.F. at 41.) Margaret was also the residuary legatee of their uncle's Last Will and Testament. (Ex. 1)

The named defendants in this lawsuit were Bank of America, the successor corporate trustee holding the funds of Dr. Kimbrough, and Washington University that also claimed the funds. The Attorney General was joined as a necessary party. (L.F. at 87-88.) A group of remaining alumni of the Dental School, the Dental Alumni Association, (not to be confused with The Dental Alumni Development Fund) was granted permission to intervene as Intervenors. (Tr. at 118, L.F. at 42.)

THE CONTROVERSY

Dr. Kimbrough had written a number of wills and had established one Trust that he amended twice. In these wills and the Trust documents, he consistently provided for his family and always included Margaret and Harvey, the parents of Louise and

Elizabeth. During a vigorous fundraising campaign to support the Dental School, Dr. Kimbrough changed his Trust in 1955 as follows:

> Upon the death of the survivor of said niece and nephew[s] and after the death of the Grantor, the property then constituting the trust estate shall be paid over and distributed free from trust unto Washington University, St. Louis, Missouri, for the *exclusive use and benefit of its Dental Alumni Development Fund*. (*emphasis added*)

Prior to this time, no provision for the Dental School or any other charity had been included in Dr. Kimbrough's Trust.

As written in the November 1954 issue of Washington University's *Dental Journal,* the Dental Alumni Development Fund was founded to support the continued operation of and to bring prestige to the Dental School of Washington University by a group of Dental School Alumni who were stimulated by their knowledge of the financial needs of the Dental School. (Ex. 15.) This written word in an article signed by the then dean of the Dental School (Leroy R. Boling) was the only recorded evidence as to the history and purpose of the Dental Alumni Development Fund. This was corroborated by a former Dental School faculty member who testified at trial. The Dental School was closed permanently by Washington University in 1991. Louise and Margaret admitted that there was a charitable trust, but state that the trust reverts to them because Dr. Kimbrough had a *specific* intent to support the Dental School that was closed. All other parties admitted to the existence of a charitable trust and that it was impossible or impractical to complete. (Tr. at 9.) Washington University claimed rights to the

remaining proceeds, despite the fact that it had closed the Dental School, asserting that Dr. Kimbrough had a *general* charitable intent, and that the court should apply the doctrine of c*y pres*, granting it the proceeds without any restrictions or to permit it to use the funds to support some aspect of dental medicine at Washington University. The Attorney General supported the position of Washington University. The Dental Alumni Association (the organization of alumni of the Dental School, to be distinguished from the Dental Alumni Development Fund) had been in existence for more than 100 years, since the time of the first graduating class of the Dental School, and its purpose was sharing communication, sharing dental knowledge, and camaraderie. (Tr. at 305-309.) Intervenors requested the application of deviation upon the trust's failure to grant the money to it, the Dental Alumni Association, to organize and provide free continuing dental educational programs for the remaining alumni of the Dental School. The Dental Alumni Association did not appeal the decision.

LIFE OF JOSEPH B. KIMBROUGH

Dr. Kimbrough was born in 1870, in Clinton, Missouri, and died in 1963, in St. Louis, where he spent most of his life. (Ex. 4, 5.) Although there was no evidence that he had attended an undergraduate college, he did enroll in the Missouri Dental College in 1890. (Tr. at 31, 134, 340; Ex. 14.) The Missouri Dental College was founded in 1866. (Ex. 4.) At that time, it was an independent institution located in St. Louis, Missouri, unaffiliated with Washington University. (Ex. 14.) Midway through the course of Dr. Kimbrough's education at the Missouri Dental College, the Dental College was acquired by Washington University, and Dr. Kimbrough graduated with a D.D.S. degree in 1894.

(Tr. at 30-31, Ex. 14.) Dr. Kimbrough was a faculty member of the Dental School for a brief interval, but spent the great majority of his career in the private practice of general dentistry and prospered financially. (Ex. 1, 4, 13, 14.) He was proud and appreciative of the Dental School that trained students like him to become dentists. (Tr. at 57, 60, 185.)

Although Dr. Kimbrough never married or had any children of his own, he was very close to his family, and there is a clear pattern in his estate documents of providing for his family, including a brother who predeceased him, and other family members, including Louise's mother Margaret and Elizabeth's father Harvey, who were his next of kin. (Ex. 4)

Both Louise and Elizabeth enjoyed a warm familial relationship with Dr. Kimbrough, known to them as "Uncle Joe." They saw him regularly throughout their lives until his death that occurred when they were young adults. (Tr. at 17-18, 46, 56-57, 59.) Dr. Kimbrough had been part of their close-knit family, and they still have pictures of him, including one of him in front of his dental office. (Tr. at 18-19; Ex. 13.) Louise had more frequent contact with Dr. Kimbrough because she grew up in St. Louis, and was able to visit him both at his home and her own. Both saw him regularly at holiday family gatherings. (Tr. at 18, 50.) Elizabeth, who lived in Illinois, and later in Kansas, came to St. Louis for family visits and saw her uncle at those times, and has vivid recollections of times spent with him. (Tr. at 57-60.) He often talked to her about being proud of his profession and of the Dental School. She did not recall his ever having mentioned Washington University to her. (Tr. at 57.) Dr. Kimbrough died on the 10th

day of December, 1963, and was buried in the family cemetery in Clinton, Missouri (Tr. at 29-30, Ex. 5.)

THE DENTAL SCHOOL

As stated above, the Dental School was opened in 1866 as the Missouri Dental College and acquired in 1892 by Washington University, and was known for a time as the Washington University School of Dentistry. (Supp. L. F. 97). When it was closed in 1991, it was called the Washington University School of Dental Medicine. The purpose of the Dental School was to train dental students to become practicing dentists. (Tr. at 265.)

While part of Washington University, the Dental School was what Washington University called a "Reserve School." (Tr. at 353.) This meant that it was responsible for its own financial stability and received no funding from the parent university. (Tr. at 353-55.) The Dental School supported itself by its own fund raising efforts, tuition of students, and fees for services. (Tr. at 185-86, 261, 353-56.) The *Dental Journal* recorded the history of the Dental School, provided information to its alumni about educational events, and published articles on other topics of interest, including fundraising needed by the Dental School. (Ex. 15.) Dr. Kimbrough's name appeared as a donor. (Ex. 15) (Intervenor's Ex. H.)

The Dental School had a free-standing building at 4559 Scott Avenue for the education of its students and a research building that was built during Dr. Kimbrough's later years through fundraising efforts. (Tr. at 185; Ex. 15.) Letters of appreciation were sent to alumni who contributed to the Dental School (Supp. L.F. at 79-96.) When Dr.

Kimbrough contributed to a fund for the Dental School, he regularly received letters assuring him his contributions were helping the Dental School. (Supp. L. F. 89, 91, 93, 95, 96.) Alumni were also strongly encouraged to include the Dental School in their estate documents as well. (Intervenor's Ex. H.)

THE DENTAL ALUMNI DEVELOPMENT FUND

The Washington University Dental Alumni Development Fund was created in 1953, and the Dental Alumni were actively solicited for this fund. (Tr. at 135-136, Ex. 15, 37.) Soon after its creation, Dr. Kimbrough contributed $200 in May of 1954 for the Dental Alumni Development Fund. (Supp. L. F. at 79.) The *Dental Journal* described this campaign in its November 1954 issue, reporting on and describing this fundraising effort for the continued success of the Dental School, and referring to the Dental Alumni Development Fund by name. (Ex. 15.) Periodically, articles published in the *Dental Journal* would encourage the alumni to contribute for specific needs of the Dental School, such as a new building. In 1959, Dean Boling of the Dental School exhorted the alumni in the *Dental Journal* to contribute to an endowment fund "for the sole use of the School of Dentistry." (Ex. 15.) There are records of donations to the Dental Alumni Development Fund from its inception in 1953 until after the death of Dr. Kimbrough. (Ex. 40.)

The 1954 issue of the *Dental Journal* provided the only documented record of the purpose of the Dental Alumni Development Fund. It was described as follows:

> . . . <u>first, of course</u>, is the actual financial assistance to the <u>continued operation of the School</u> at a high level, and second, is the boost in morale

> and in prestige that the School and its faculty receive from the knowledge that the alumni back them and are interested in their constant improvement.

(Ex. 15.) (*emphasis added*). This information was in an article signed by Dean Boling of the Dental School. (Tr. at 68-69; Ex. 15; Intervenor's Ex. G, Supp. L.F. 98-99). It is undisputed that "the School" clearly meant solely the Dental School and the "alumni" only referred to the Dental School alumni. (Tr. at 73, 367.)

John Gilster, D.D.S, a 1944 graduate of the Dental School, who was on the faculty of the Dental School at the time of the creation of the Dental Alumni Development Fund, corroborated the documented purpose of the Dental Alumni Development Fund and that it was formed because of the extremely strong interest the dental alumni had always had in the Dental School. (Tr. at 67.) The Dental School had other funds, including a loan fund for students (The Koplar Loan Fund), and a fund for the treatment of malocclusions, that would have included the treatment of those suffering because of cleft palates, (The John S. Swift Fund). (Tr. at 69; Ex. 15, Intervenor's Ex. F.) Dr. Kimbrough did not contribute to either of these funds.

The *Dental Journal* provided guidance and suggestions to potential donors including possible wording to establish a memorial fund in a particular donor's name for the support of the School of Dentistry. Such an example, stated in part, is as follows:

> If at some time in the future, in the judgment of the University Board of Directors, the need of income for the aforementioned purpose no longer exists or shall not require the entire income derived from such fund, then the income from the fund or the portion thereof not required for this

purpose may be utilized in such manner as may be determined by the Board of Directors, but with its identification by name and as a memorial to be retained and continued.

(Ex. 15.)

However, Dr. Kimbrough used different language than that suggested above in that he did not give the University Board of Directors authority to use his trust corpus in a different way if the purpose failed. (Ex. 1.)

STATUS OF THE DENTAL SCHOOL

Dr. Gilster testified at trial that many of the alumni and faculty considered the Dental School to be the "step-child" of the University and thought it was not treated as well as the Medical School. (Tr. at 83-84, 214; Ex. 26.) George G. Selfridge, Dean of the Dental School from September of 1976 to January of 1987, testified about the status of the Dental School as a "Reserve School." He stated that the Dental School received no support from the University, that is it had to fund itself, and that it actually paid the University for certain services. (Tr. at 353.) Dean Selfridge testified that he disagreed with the position of Washington University in this case, as the money would go to a different source than for what it was intended if Washington University prevailed. (Tr. at 354.) He said that he was disappointed about how Washington University had treated the Dental School and that he would never get over it. (Tr. at 367-368.)

THE CLOSING OF THE DENTAL SCHOOL

In the late 1980's, Washington University conducted a study to determine the fate of the Dental School. (Tr. at 80-81; Ex. 18, 33.) There was declining enrollment at the

Dental School, and the Dental School was not able to spend an equivalent amount of money per student as state schools were on the education of their students. (Tr. at 80.) At about the same time, Washington University conducted its Alliance Campaign and raised approximately $630,000,000 (six hundred thirty million dollars). (Tr. at 83, 200; Ex. 18.) The study concerning the fate of the Dental School concluded that there were four options: 1.) not to change the status of the Dental School, but to keep it open, 2.) increase outside funding to support the Dental School, 3.) switch the Dental School as a school for the matriculation of general dentistry to a post-graduate model, or 4.) close the Dental School. (Tr. at 80-81, 216-217; Ex. 18; Ex. 33.) Washington University chose to close the Dental School. (Tr. at 32-40, 62-63, 76-78, 81, 108, 110-111, 113-116, 130,136, 142, 147, 163, 168, 169, 185, 188, 189, 209, 210, 218, 242, 245, 247-9, 280-1, 286, 318, 320, 331, 358, Ex. 16, 17, 25.) There was much evidence concerning the closing of the Dental School, and the trial court found that not only was it an undisputed fact that the Dental School was closed in 1991, but also there was evidence it would never re-open. (Tr. at 210.)

The amount of money needed to sustain the Dental School, keeping it a significant "force" in the dental world, was estimated to be approximately $20 million, or about 3% of the total of the funds raised in the Alliance Fundraising Campaign. (Tr. at 82, 200-02; Ex. 18.) However, the Chancellor of the University stated that reallocation of funds from other activities was not a wise course to follow. (Ex. 18.) In a written statement to the community he explained why money could not be used to keep the Dental School afloat:

> Like a family, Washington University must live within its means, and yet make provisions for its future. Unlike a family, the University serves society as a vehicle for private benefactors to achieve worthwhile social goals. This fact appropriately limits our flexibility. Resources for specific purposes are given in trust. *We should not, and by law may not, divert funds that are entrusted to us for one purpose in order to use them for another.*

(Tr. at 83) (*emphasis added*). In this Statement to the Community, it was stated, " . . . over 90 percent of the funds given during the Alliance campaign were earmarked." (Ex. 18.) Hence, the 10% or $63,000,000.00, not earmarked and available for other purposes was not used for the continued operation of the Dental School. (Ex. 18.)

During the Alliance Campaign, there was a matching program of $3 dollars from the Danforth Foundation for every $1 raised by alumni for their respective schools, with the exception of the Dental School. (Tr. at 357.) Dean Selfridge recalled being at a $1,000 a plate fundraising event, when businessmen were challenging each other to make sizeable contributions, and the dental alumni looked at him for answers about what the Dental School would get:

> I said we're not getting anything. And that night I went home and I told my wife I'm going to submit my letter of resignation because it just can't go on like this any longer.

(Tr. at 358.)

The Dental School did not receive any of the Alliance Campaign matching funds. (Tr. at 357.)

According to the report, the committee considering the fate of the Dental School opined that while there would be a loss of educational opportunities, one of the positive aspects of closing it was that the Medical School could use the building that was the Dental School's building at 4559 Scott Avenue. (Tr. at 77-78, 185, 201-202, 204; Ex. 33, 39.)

Upon the closing of the Dental School, the Washington University fundraising office sent out letters to Dental School Alumni seeking donations to the University, saying:

> As you know, Washington University's School of Dental Medicine has ceased operation. As a result of its closing, all funds designated for the School, other than those for the Dental Library, must be redirected for a new purpose.

(Tr. at 162; Ex. 28.)

Also, a strategy was developed by the fundraisers and other university officials that persons known to have designated the Dental School in their wills would be contacted to "inform them of the change and to make suggestions to them for an alternate purpose. . . ." (Tr. at 205, Ex. 20.) When the Dental School closed, and a former dental alumnus wanted to move previously donated endowment funds to another university, the sentiment of Washington University was that he should be permitted to do so, as they did not want to get a reputation for disregarding donor's intentions. (Tr. at 210-211.) Upon

the closing of the Dental School, fundraisers sought permission of live donors who had donated money to existing Dental School funds to change the purpose of their intended donations. (Supp. L.F. at 62.) Mr. David Jolly, an official at Washington University, serving as fundraiser and liaison with the dental alumni after the Dental School closed, testified that after three unproductive years of seeking donations from the dental alumni after the Dental School closed, he ceased soliciting funds from Dental School alumni. (Tr. at 255-59.)

The Dental School, while it existed, had a long and illustrious history and a loyal following of alumni. (Tr. at 66, 263.) For a number of years in the early 1960's, the alumni of the Dental School were at the top of the donor list for contributions. (Tr. at 107-108, Intervenors' Ex. I.) From its free-standing building located at 4559 Scott Avenue in the City of St. Louis, it graduated students with the knowledge, skills, and values to begin their practice of general dentistry. (Tr. at 264-65.)

At the time of the closing of the Dental School, it was 125 years old, the oldest Dental School west of the Mississippi (Tr. at 85.) The general mission of it and other dental schools was to educate students to become practitioners of dentistry. (Tr. at 150, 184-85, 265.)

Dr. Gilster stated that the day of the announcement of the closing of the Dental School, " . . . will live in infamy." (Tr. at 112.) He was shocked when the University immediately appropriated the Dental School's laboratories and gave them to the Medical School. (Tr. at 78.) The Dean of the Dental School stated in a letter to the dental alumni:

> This is one of the most difficult letters I have ever written. This morning the Washington University Board of Trustees made the determination that the School of Dentistry Medicine will be closed. I am deeply saddened by the decision . . . .

(Tr. at 136-37; Ex. 35.)

The September 8th, 1990 Minutes of the 124th Annual Meeting Of The Membership of The Washington University Dental Alumni Association stated, "The building is being slowly carved up and [it is] not easy to watch." (Tr. at 77; Ex. 16.) The last dean of the Dental School, who served from the date of the announcement of the closing until the day it was closed, was appointed with the mission of "dismantling the product of 123 years of endeavor, dedication and commitment." (Tr. at 251; Ex. 35.)

The Dental Alumni Association changed its bylaws to provide for its assets to pass to the American Dental Association rather than to Washington University. (Tr. at 330.)

> The trial court, judging the credibility of the witnesses, in its Judgment stated it, acknowledges the palpable sense of betrayal of many Dental School alumni toward Washington University over what many regard as the "Pearl Harbor" closing of the Dental School in 1991 after signs of hopeful continuation were perceived. This Court genuinely laments this enduring intra-familial estrangement.

(L.F. at 289.)

DR. KIMBROUGH'S ESTATE PLAN

Dr. Kimbrough's attorney and friend, Mr. Clarence Weindel, assisted Dr. Kimbrough in his estate planning. (Ex. 2, 4.) Dr. Kimbrough established his revocable *inter vivos* Trust in 1945 when he was 75 years of age. (Ex. 1.) It was for his own benefit and then for the benefit of his family, and he was a co-trustee along with a corporate trustee. There was no charitable component at this time.

He granted the trustees broad discretion in the investments of the trust assets and they were not limited to investing in stocks and bonds. (Ex. 1.) Dr. Kimbrough also provided encroachment and advancement provisions for his beneficiaries:

> "Section 4: The Grantor hereby authorizes the Trustees to *encroach upon the principal* of the trust estate for the use and benefit of the beneficiaries of the trust herein created to provide for their proper maintenance and support, or to provide against any emergency which may arise affecting them occasioned by sickness, accident, ill health, misfortune or otherwise, and the said Trustees *may advance such sum or sums out of the principal* of the trust estate for the use and benefit of said beneficiaries as they shall consider reasonable and proper under the circumstances and *make such advancements from time to time* when they believe it proper to do so and for the best interests of said beneficiaries.

(Ex. 1) (*emphasis added*).

Upon Dr. Kimbrough's death, the trust was to continue for the benefit of his brother Henry S. Kimbrough, with the remainder to go outright to five named family

members or their survivors, that included Louise's mother and Elizabeth's father. (Tr. at 24-25; Ex. 1.)

When Dr. Kimbrough was 84 years old, in 1954, nine years after he established the Trust, and before the amendment providing for the charitable trust, Dr. Kimbrough amended his trust to provide that federal and Missouri estate taxes would be borne pro-rata between the trust assets and the probate estate. (Ex. 1.) The following year, about two years after the formation of the Dental Alumni Development Fund, on September 23, 1955, at age 85, Dr. Kimbrough made the second and final amendment to the Trust. This amendment substituted a new section 2 that provided that Margaret and Harvey [and Oscar, another nephew] were to receive a life interest in the trust corpus, and then:

> Upon the death of the survivor of said niece and nephew[s] and after the death of the Grantor, the property then constituting the trust estate shall be paid over and distributed free from trust unto Washington University, St. Louis, Missouri, *for the exclusive use and benefit of its Dental Alumni Development Fund*."

(Tr. at 25-26, Ex. 1) (emphasis added).

This amendment was made during the active solicitation for funds to support the continued operation of the Dental School.

Dr. Kimbrough made the corpus of the trust available to his family if they needed it. This is reflected in the amended Section 2 that included language similar to the encroachment provision of the original trust:

> In the event the Grantor, or any of the other beneficiaries mentioned in subdivision (b) hereof then receiving or entitled to receive income from the trust estate, should become incapable of managing his or her affairs due to physical or mental disability, whether or not judicially declared incompetent (which disability shall be determined in the sole judgment of the corporate Trustee), such Trustee shall use and apply *net income and principal* of his or her share in the trust estate for his or her care, maintenance, support and welfare.

(Ex. 1) (emphasis added).

This amendment ratified the original trust as amended that included the other encroachment provision (Sections 4) set out above.

While Dr. Kimbrough had substantial assets in trust, he also had assets that passed through his will via probate, including his house, various funds, and personal property. (Ex. 4.) Dr. Kimbrough wrote many wills during his lifetime, and on June 11, 1959, four years after the last Amendment to the Trust, Dr. Kimbrough wrote his second to last will that provided that after specific bequests were made, the rest and residue of this estate was to go "to Washington University for the exclusive use of the Dental Alumni Development Fund." (Tr. at 35; Ex. 2.)

Dr. Kimbrough executed his *ultimate* Last Will and Testament, on May 21, 1962, one year before he died. This will, the one that was ultimately probated, expressly revoked the 1959 will. (Ex. 4.) This ultimate Last Will and Testament changed the

residuary clause, replacing Washington University as trustee for the Dental Alumni Development Fund with Margaret Derrick as the primary residuary beneficiary. It read:

> "All the rest, residue and remainder of my property and estate, both real and personal, of every kind and description and wheresoever situated of which I may die seized or possessed, or to which I may be entitled at my death, *I give, devise and bequeath unto my said niece, Margaret Derrick*, if living, otherwise I give, devise and bequeath the same unto Washington University of Saint Louis, Missouri *for the exclusive use and benefit of its Dental Alumni Development Fund*."

(Ex. 4) (*emphasis added*).

The Last Will and Testament specifically mentions that the estate plan of Dr. Kimbrough was an evolving process and specifically refers to the Trust. (Ex. 4.) The Last Will and Testament did provide for a $5,000 bequest for Louise and a number of others, one outright charitable bequest to the League of Hard of Hearing for $2,000, with all of Dr. Kimbrough's household furniture and personal effects going to Louise's mother, Margaret. Margaret also acquired Dr. Kimbrough's home and all of his personal residence through the residuary clause. (Tr. at 39, Ex. 4.) While there was no provision naming Elizabeth in the Last Will and Testament, she was not specifically excluded as a beneficiary.

FACTS RELATING TO THE DEATH OF DR. KIMBROUGH

Upon learning of Dr. Kimbrough's death in 1963, a fundraiser wrote the Chancellor Thomas Eliot of Washington University by inter-office memo:

> Doctor Joseph B. Kimbrough, an alumnus of our School of Dentistry, died within the last few weeks and the report of his will failed to indicate any mention of the University. I have learned, however, that Doctor Kimbrough's principal assets were left in a trust established during his life, under which the income is to go to Mrs. Reid Derrick [Margaret] and her brother [Harvey], a great niece and great nephew respectively, and the corpus of the estate is to go to the Dental Alumni Development Fund after the death of the survivor.

(Tr. at 158-59; Ex. 32) (*emphasis added*).

Louise's mother, Margaret, was alive at her uncle's death, inherited all of his personal possessions and real estate through the residuary clause, and was the family member who provided the information on his death certificate. (Ex. 5.) Upon Dr. Kimbrough's death, Margaret and Harvey were the beneficiaries receiving income and had the benefits of the encroachment provisions of the trust until their respective deaths. (Ex. 1.) There was no evidence presented at trial as to whether actual encroachments were made on behalf of any of the beneficiaries, and there is a corpus remaining. Harvey Salmon died on April 25, 1980 (Tr. at 37) and Margaret Salmon Derrick died on September 19, 2000, at age 91. (Ex. 6.)

FACTS CONCERNING THE TESTAMENTARY DOCUMENTS AS FOUND IN THE TRIAL COURT'S JUDGMENT

The trial court mistakenly relied on the second to last or 1959 will when it found that the Last Will and Testament, "contained language granting to Washington University

the rest and remainder of Dr. Kimbrough's estate." As stated above, Louise's mother was the residuary legatee. The trial court also mistakenly found that, "Dr. Kimbrough provided for the Appellants (Louise and Elizabeth) in this action by leaving each of them $5,000.00." Only Louise received $5,000. Those findings are not consistent with Dr. Kimbrough's Last Will and Testament. (L.F. at 288.)

FACTS CONCERNING LIFETIME GIFTS OF DR. KIMBROUGH

Washington University presented evidence of eleven charitable donations made by Dr. Kimbrough during his life, specifically from 1954 to 1963. The first gift was for $200 for the Dental Alumni Development Fund. (Supp. L.F. at 79-96.) The other donations were for $100 each. (Supp. L.F. at 14, 31, 79-96.) That first gift was acknowledged by a receipt dated May 14, 1954 "for the Dental Alumni Development Fund." (Supp. L.F. at 79.) The second gift was acknowledged by a receipt dated May 11, 1955 "for the School of Medicine." (Supp. L.F. at 80.) The third gift was acknowledged by a letter dated May 28, 1955 for Washington University's "Second Century Development Program." (Supp. L.F. at 81.) The fourth gift was acknowledged by a letter dated November 20, 1956 for Washington University's "Second Century Development Program." (Supp. L.F. at 83.) The fifth gift was acknowledged by a letter dated April 17, 1958 for the "Alumni Fund" (Supp. L.F. at 85). The card submitted with the gift by Dr. Kimbrough indicates he wanted it for his Alumni School. (Supp. L.F. at 86.) The sixth gift was acknowledged by a letter of October 31, 1956 to "the Alumni Fund." (Supp. L.F. at 87.) The seventh gift was acknowledged by a letter dated November 12, 1959 for "the Alumni Fund for the School of Dentistry." (Supp. L.F. at

89.) The eighth gift was acknowledged by a letter dated July 15, 1960 for "the Alumni Fund for the School of Dentistry." (Supp. L.F. at 91.) The ninth gift was acknowledged by a letter dated July 24, 1961 for "the School of Dentistry." (Supp. L.F. at 93.) The tenth gift was "for the School of Dentistry." (Supp. L.F. at 95.) The eleventh gift was "for the School of Dentistry." (Supp. L.F. at 96.) In most instances, Dr. Kimbrough received a letter of appreciation for these gifts denoting how those gifts would be used. (Supp. L.F. at 79-96.)

Mr. David Jolly stated that it would not be possible for one school, such as the law school, to use funds raised by another school and designated for that other school. (Tr. at 260-61.) Mr. David Blasingame, the vice-chancellor for alumni and development programs at Washington University, testified that the enclosure forms used for sending in gifts in use at the time of Dr. Kimbrough's lifetime gift giving demonstrated that, " . . . the alumni can direct it to a particular school or not." (Supp. L.F. at 7, 39.) Mr. Blasingame acknowledged that Dr. Kimbrough most likely would have thought that when he received letters mentioning the Dental School that his donations would be used by the Dental School. (Supp. L.F. at 43-44.)

CHRONOLOGY OF TRUST DOCUMENTS

RELATED TO THE SOLICITATION FOR FUNDS

Mr. David Jolly stated that the University never changes the names of funds. (Tr. at 259-260.) The records of the University showed that funds were contributed to the Dental Alumni Development Fund from 1953-54 to 1962-63. (Tr. at 282-283, Ex.40.) That time period spans the following events:

1. Creation of the Dental Alumni Development Fund in 1953;
2. Dr. Kimbrough's first recorded lifetime gift for the Dental Alumni Development Fund in 1954;
3. Dr. Kimbrough's intent in his amendment to his trust executed in 1955, stating that the remaining corpus would go for the exclusive use and benefit of its Dental Alumni Development Fund;
4. The second to the last Will executed in 1959, providing for the residuary of the probate estate to go for the exclusive use and benefit of its Dental Alumni Development Fund;
5. The last Will executed in 1962, providing for the residuary of the probate estate to go to Margaret Derrick, (with a contingent remainder to Washington University for the exclusive use and benefit of its Dental Alumni Development Fund); and
6. The death of Dr. Kimbrough in 1963.

The recorded purpose of the Dental Alumni Development Fund has been stated above. It was solely for the operation of the Dental School. (Tr. at 68-69; Ex. 15; Intervenor's Ex. G.)

EVIDENCE PERTAINING TO ACTIVITIES AT WASHINGTON UNIVERSITY AT THE TIME OF TRIAL

At present, the hospitals affiliated with Washington University's Medical School, are separate independent entities. Like most hospitals, they employ dentists to treat patients with malocclusions and other maladies where a dentist can assist in a multi-

disciplinary approach. (Tr. at 187, 296.) As possible alternatives to Dr. Kimbrough's stated purpose, Respondent Washington University presented exhibits and testimony about work done at the University in the Anthropology Department, the Harriet Steurnagel Library (with a $1,432,376.00 endowment, Tr. at 275; Intervenor's Ex. J), and the McKellops rare book collection, and the work of the two dentists on the staff of hospitals associated with the Medical School. These dentists, Drs. Donald E. Huebner and W. Donald Gay, are specialists. (Tr. at 297.) Dr. Huebner is a board certified pediatrician and pediatric dentist who is employed now as a professor in plastic and reconstructive surgery at the School of Medicine. (Tr. at 167-8.) While he is on the staff of Washington University, he generates fees greater than his salary. (Tr. at 185.) Dr. Huebner is a founding member of the Cleft Palate Cranial Facial Deformity Institute, consisting of surgeons, pediatricians, nurses, speech pathologists, audiologists, and otolaryngologists, pediatric dentists, oral surgeons, prosthodontics and orthodontics. (Tr. at 169.) This institute was founded **after** Dr. Kimbrough's death and absorbed the Laski Center which had been founded in 1974, also after his death. (Tr. at 176.) It was never part of the Dental School. (Tr. at 184.) The bulk of Dr. Huebner's time is spent in direct patient care. (Tr. at 170.) There are fees charged for the work performed and payment comes from the government, insurance and the patients. (Tr. at 177-78.) He always makes a profit. (Tr. at 186-87.) He does not teach undergraduate dental students, as there are none. (Tr. at 169-70.) The reconstructive surgery on the patients is not done by Dr. Huebner, but by plastic surgeons. (Tr. at 181.)

Dr. W. Donald Gay is a dentist and maxillofacial prosthodontist, and he was on the faculty of the Washington University Dental School. (Tr. at 284, 286.) When it closed, he became employed by Washington University, as the Director of the Division of Maxillofacial Prosthetics of the Otolaryngology Department at the Medical School. (Tr. at 286.) He works with medical residents, not dental residents. (Tr. at 296.) Dr. Gay stated that the types of defects that he treats are malocclusions. (Tr. at 295.) He does not have contact with dental students (Tr. at 286) nor does he teach dentistry. (Tr. at 296.) Most years he generates enough fees to pay his salary. (Tr. at 299.) He is not a tenured professor at Washington University, but has a four-year contract. (Tr. at 297.) Dr. Gay acknowledged the existence of a fund for the treatment of malocclusions in the amount of $500,000.00, but stated that he does not have access to this fund. (Tr. at 295.)

The John S. Swift Fund (for treatment of malocclusions), mentioned above, was publicized in the same *Dental Journal* in which the Dental Alumni Development Fund was publicized. (Intervenor's Ex. G.) Dr. Kimbrough never contributed to the John S. Swift Fund, rather he contributed to the fund to ensure the continuance of the Dental School.

Dr. Andrew M. Kim is one of two pediatric dentists in St. Louis (Tr. at 171.) Dr. Kim has an appointment through Washington University Department of Plastic Surgery and in the Department of Otolaryngology. He testified that the otolaryngological residents, who are supervised under Dr. Gay, and surgical residents, who are supervised under Dr. Huebner, are not necessarily performing a discipline of dental medicine. (Tr. at 140-42.)

Washington University presently has an endowment of at least $3 billion. (Tr. at 203.) Washington University has not provided any funds for cleft lip and palate programs or malocclusions despite having money in funds for those exact purposes. (Tr. at 187-88.)

The Intervenors (Dental Alumni Association) had a plan to obtain a tax exempt status to become a charitable organization and wanted to use funds in Dr. Kimbrough's trust to provide free continuing dental education meetings for the members of the organization at their annual meetings. (Tr. at 118.) There was no evidence that Dr. Kimbrough ever contributed donations to the Dental Alumni Association, although it was in existence during his lifetime. The Intervenors have not appealed the Court's ruling.

THE TRIAL COURT'S JUDGMENT

After concluding that Dr. Kimbrough had a general charitable intent in the creation of his inter vivos trust, the trial court applied the *cy pres* doctrine and entered the following order:

> The assets contained in the Joseph B. Kimbrough Trust shall be distributed by the Trustee Bank of America free of trust unto Washington University, St. Louis, Missouri, to further dental medicine by creating, establishing, funding and maintaining:
>
> 1) The Dr. Joseph B. Kimbrough Chair for Pediatric Dentistry in The Washington University Department of Surgery, Division of Plastic Surgery for use in The Cleft Palate/Craniofacial Deformities Institute for teaching and healing, **or**

2) The Dr. Joseph B. Kimbrough Chair for Maxillofacial Prosthodontics in the Washington University Department of Otolaryngology for teaching and healing.

or **both** and for no other purpose.

(L.F. at 292-293.)

POINTS RELIED ON

POINT I

The trial court erred by concluding that Dr. Kimbrough established his inter-vivos trust with a general charitable intent and by applying the *cy pres* doctrine because such conclusion is a misapplication of the law and contrary to Missouri legal precedent in that the unambiguous language of the Trust and the surrounding circumstances dictate a conclusion that Dr. Kimbrough established his Trust with a specific charitable intent, requiring that the trust corpus revert to his heirs.

Comfort v. Higgins, 576 S.W.2d 331,338 (Mo. banc 1978)

Thatcher vs. Lewis, 76 S.W.2d 677, 682 (Mo. 1934)

First National Bank of Kansas City v. Stevenson, 293 S.W.2d 362 (Mo. 1956)

Vollmann v. Rosenburg, 972 S.W.2d 490 (Mo. App. E.D. 1998)

Section 474.430 RSMo. (1992)

POINT II

The trial court erred in concluding that Dr. Kimbrough's charitable trust had a general purpose because said finding is against the weight of the evidence in that the substantial evidence in this case (both intrinsic and extrinsic) prove that Dr. Kimbrough 's trust had a specific purpose to benefit the Dental School exclusively.

Comfort v. Higgins, 576 S.W.2d 331,338 (Mo. banc 1978)

Thatcher vs. Lewis, 76 S.W.2d 677, 682 (Mo. 1934)

Curators of the University of Missouri vs. University of Kansas City, 442 S.W.2d 66, 70 (Mo. banc 1969)

In re Morrissey v. St. Louis Union Trust Co., 684 S.W.2d 876, 878 (Mo. App. E.D. 1984)

ARGUMENT

I.

The trial court erred by concluding that Dr. Kimbrough established his inter-vivos trust with a general charitable intent and by applying the *cy pres* doctrine because such conclusion is a misapplication of the law and contrary to Missouri legal precedent in that the unambiguous language of the Trust and the surrounding circumstances dictate a conclusion that Dr. Kimbrough established his Trust with a specific charitable intent, requiring that the trust corpus revert to his heirs.

A. The Doctrine of Cy Pres

1. Background

Courts attempt to discern the real intent of the grantor or the testator in construing testamentary documents, as the prime rule of construction is that the court must confine its endeavors to ascertaining the real intent of the testator or grantor. First National Bank of Kansas City v. Stevenson, 293 S.W.2d 362, 366 (Mo. 1956); Hertel v. Nationsbank, N.A., 37 S.W.3d 408, 410 (Mo. App. E.D. 2001); Section 474.430 RSMo. (1992). The policy behind such holdings is the freedom of testation or the right to dispose of one's own property as one sees fit, so long as it is not illegal. Evans v. Abney, 396 U.S. 435, 441; 90 S. Ct. 628; 24 L. Ed. 2d 63 (1970). Such a freedom of testation is merely an extension of property rights of individuals while they are alive.

For donors who make bequests or gifts in their estate documents either by will, deed, or trust, that vest *at* or *after* their deaths, permission to change the purpose cannot

be obtained from their graves. Hence, the courts look to the intentions, and if there was a specific intention in the creation of a charitable trust, then the funds revert to their estate or their heirs. Comfort v. Higgins, 576 S.W.2d 331, 338 (Mo. banc 1978). The doctrine of *cy pres* is an equitable remedy used in certain charitable trust cases when the trust has failed and the grantor of the trust had a *general* charitable intent. Id. In an appropriate case, it allows a court to continue a trust in a way "as near as possible" as the grantor had contemplated, but in so doing there is not a change of purpose. Parsons v. Childs, 345 S.W.2d 327, 330 (Mo. 1939).

Nevertheless, Missouri does not apply *cy pres* if the donor had a *specific* charitable intent, as to do so would defeat the purpose of the donor's intent. Comfort v. Higgins, 576 S.W.2d 331, 338 (Mo. banc 1978); Thatcher vs. Lewis, 76 S.W.2d 677, 682 (Mo. 1934). As set forth in Appellants' Listing of American Authorities included in Appellants' Appendix to this Brief, Missouri aligns itself with the overwhelming majority of other states that order reversion to heirs when finding specific charitable intent. (App. A15-A21.) Contrary to the position of the Respondent in its Application for Transfer, a reversion to heirs upon finding of specific intent is not "a radical departure from existing Missouri precedent." If the intent is specific and the purpose of the gift has become impossible, illegal, or impracticable to fulfill, then the property reverts to the heirs, as permission from the real donor cannot be obtained. Comfort v. Higgins, 576 S.W.2d 331,338 (Mo. banc 1978); Parsons v. Childs, 345 S.W.2d 327, 330 (Mo. 1939).

The doctrine of *cy pres* has long been part of the common law and at one time had two forms—prerogative *cy pres* and judicial *cy pres*. Parsons v. Childs, 136 S.W.2d 327,

330 (Mo. 1939). The old English doctrine of prerogative *cy pres* was the King's power to transmute the purpose of a charitable trust to another purpose of his own choosing. Id. A particularly egregious example of prerogative *cy pres* occurred in the 1700's when the King used funds for Christian education of children that had been designated in the will of a Jewish teacher to be used for Jewish assemblies. 27 Eng. Rep. 150 (1754). The old English doctrine of prerogative *cy pres* has never been recognized in the United States. Parsons v. Childs, 136 S.W.2d 327, 330 (Mo. 1939).

Even in those cases where the grantor had a repugnant intention that failed because of illegality, courts do not apply *cy pres* unless there is a general charitable intent. A few of these *cy pres* cases have made their way to the U.S. Supreme Court. As stated in Evans v. Abney, 396 U.S. 435, 447; 90 S. Ct. 628; 24 L. Ed. 2d 634 (1970):

> . . . [T]he loss of charitable trusts . . . is part of the price we pay for permitting deceased persons to exercise a continuing control over assets owned by them at death. This aspect of freedom of testation, like most things, has its advantages and disadvantages. The responsibility of this Court, however, is to construe and enforce the Constitution and laws of the land as they are and not to legislate social policy on the basis of our own personal inclinations.

2. Discerning the Intent

In discerning the intent of the grantor, the basic equitable issue is what would the settlor desire if he or she knew that the purpose of the trust could not be carried out? Levings vs. Danforth, 512 S.W.2d 207, 211 (Mo. App. W.D. 1974). The question then is what would Dr. Kimbrough desire if he knew that the remaining corpus could not be used for the continued operation and prestige of the Dental School. In determining the grantor's intent, the court should place itself as nearly as possible in the position of the grantor. First National Bank of Kansas City v. Stevenson, 293 S.W.2d 362, 366 (Mo. 1956).

If the other alumni of the Dental School felt betrayed by the closing of the Dental School and the lack of support of the Dental School, and considered that they were victims akin to those who suffered at Pearl Harbor as noted in the trial court's judgment, it is highly probable that Dr. Kimbrough would have had those same feelings. (L.F. at 289.) Evidence is found that the dental alumni are disinclined to contribute to Washington University after the closing of their school in Mr. Jolly's decision to cease soliciting them for contributions to Washington University as it was not productive in the three years following the closing of their school. (Tr. at 255-59.) These dental alumni demonstrated a "palpable sense of betrayal" to the trial court. As noted in the judgment of the trial court this estrangement between the alumni and Washington University was enduring. (L.F. at 289.)

Dr. Kimbrough, also an alumnus, used unequivocal and binding language that the corpus of his Trust was for the exclusive use and benefit of the Dental Alumni Development Fund, as he only wanted to benefit his Dental School.

The undisputed fact that Respondent Washington University chose to write to and consult with the live donors who had created gifts or had intentions to make bequests for the benefit of the Dental School to determine if they would agree to a new purpose for their gifts at the close of the Dental School is evidence of Washington University's knowledge that these alumni of the Dental School had specific intentions to support the Dental School, and the Dental School only. (Tr. at 161-162; Ex. 26; Ex. 28.) The undisputed fact that after the close of the Dental School, alumni of the Dental School ceased making contributions is evidence that their donations were specifically for the Dental School, and the Dental School only. (Tr. at 258.) The fact that when the Dental School closed, and a former dental alumnus wanted to move previously donated endowment funds to another university, the sentiment of Washington University was that he should be permitted to do so, as they did not want to get a reputation for disregarding donor's intentions, indicates an appreciation of Respondent Washington University of the specific intent of that particular donor. (Tr. at 210-211.) Finally, again Respondent Washington University admitted the importance of respecting the intent of donors in its publication to the Washington University Community after Washington University decided to close the Dental School. Washington University avowed:

> . . . the University serves society as a vehicle for private benefactors to achieve worthwhile social goals. This fact appropriately limits our flexibility. Resources for specific purposes are given in trust. We should not, and **by law may not**, divert funds that are entrusted to us for one purpose in order to use them for another.

(Tr. at 83; Ex. 18 at 4) (*emphasis added*).

Paraphrasing the Colorado Supreme Court in an analogous case, "Standing in his shoes, gathering his purpose and his dream . . . and looking down the years at changed conditions . . . no stretch of the imagination will permit the belief that his cherished purpose would be measurably carried out by the transfer of those assets or that he would ever have countenanced such a diversion." Fisher v. Minshall, 78 P. 2d 363, 366 (Co. 1938).

3. Cy pres Not Applied If Trustee Changes Conditions that Frustrate Intent

It is of note that other jurisdictions have considered the subtlety of whether a claimant who has been the cause of the impossibility causing the failure of the trust can thereby benefit or if such a claimant would be disqualified from making application for the use of *cy pres* in its favor. Courts that have considered this issue have found that " . . . the *cy pres* doctrine does not authorize or permit a court to vary the terms of a bequest and to that extent defeat the intention of the testator merely because the variation will meet the desire and suit the convenience of the trustee." Connecticut College v. United States, 276 F. 2d 491, 497 (D.C. Cir. 1960). A trustee by his own act may not produce changed conditions which frustrate the donor's intention and still claim the gift through the application of *cy pres*. Id. at 497, *citing* In re Costolo's Will, 4 N.Y.S. 2d 665, 557 (N.Y. App. 1938). In cases in which the Trustee is the applicant for *cy pres*, it has been held that the " . . . trustee will not be permitted to invoke the *cy pres* doctrine when his own deliberate act has prevented the fulfillment of the trustor's purpose . . . ." Connecticut College v. United States, 276 F. 2d 491, 497 (D.C. Cir. 1960), *citing to*

President and Fellows of Harvard College v. Jewett, 11 F. 2d 119, 122 (6th Cir. 1925); *see also*, Frame v. Shreveport Anti-Tuberculosis League, 538 So.2d 684 (La. App. 1989). It follows that Washington University should not be rewarded for frustrating the purpose of Dr. Kimbrough's trust.

4. Requirements in State of Missouri to Apply the Doctrine of Cy Pres

Missouri courts hold that to apply the doctrine of *cy pres* three requirements must be met: the trust in question must be a valid charitable trust; it is or becomes impossible or impracticable or illegal to carry out the particular purpose of the trust; and finally, the settlor must have established the trust with a general charitable intent. Comfort v. Higgins, 576 S.W.2d 331, 336 (Mo. banc 1978); Levings v. Danforth, 512 S.W.2d 207, 210 (Mo. App. W.D. 1974). If it is concluded that the settlor had a specific intent, then the *cy pres* doctrine cannot be applied. Comfort v. Higgins, 576 S.W.2d 331, 336 (Mo. banc 1978.

The trial court in its Findings of Fact, Conclusions of Law, Judgment and Ukase (hereinafter referred to as "Judgment") correctly found that a "valid, charitable trust was created by Dr. Kimbrough" (L.F. at 290.) It concluded that the Dental Alumni Development Fund was no longer in existence, however, the trial court erroneously concluded that Dr. Kimbrough had a general charitable intent. (L.F. at 292.) The trial court's opinion is not consistent with Missouri precedent applying of the *cy pres* doctrine. The trial court failed to follow the leading and most recent Missouri cases interpreting *cy pres*, Comfort v. Higgins and Vollmann v. Rosenburg, 972 S.W.2d 490 (Mo. App. E.D.

1998), which fully set forth the guidelines for interpreting the testator's intent in light of the surrounding circumstances at the time of the creation of a trust instrument. By failing to follow the legal precedent of Vollman and Comfort, the trial court not only failed to follow the testator's intent, but committed reversible error by creating a new purpose for Dr. Kimbrough's trust. This is violative of Missouri law and fails to respect Dr. Kimbrough's testamentary freedom to dispose of his property as he saw fit.

B. The Trial Court Erred and Misapplied the Law by Failing to Follow Precedent of the Missouri Supreme Court in Comfort v. Higgins, and by the Court of Appeals in Vollmann v. Rosenburg.

The Comfort and Vollman decisions are the most recent and probative cases decided in Missouri's legal history that not only clearly resemble the facts of the case at bar, but thoroughly examine the application of *cy pres* and the finding of general vs. specific intent. To date, Comfort v. Higgins represents the most thoughtful and detailed description of the analysis that a Court should follow when deciding the intent of a donor of a charitable trust.

In support of its opinion, the trial court in the instant case cited to cases that preceded and helped fashion the legal precedent set forth by the Supreme Court of Missouri in Comfort and by the Eastern District Court of Appeals in Vollmann. Among the cases that the trial court cited in support of its holding of general charitable intent in the instant case were Thatcher v. Lewis, 76 S.W.2d 677 (Mo. 1934) and Levings v.

Danforth, 512 S.W.2d 207 (Mo. App. W.D. 1974). Although both of these cases are still good law, the facts of these cases are clearly distinguishable from those of Comfort, Vollman, and the instant case and neither articulate as Comfort does the thorough analysis of the testator's intent and the emphasis placed on preservation of that intent. The facts of the instant case are more closely related to the facts of both Comfort and Vollman, and it was reversible error not to follow and consider the impact these decisions have had on the direction of the law and the emphasis on preserving the specific intent of the testator. As so eloquently put by Justice Oliver Wendell Holmes, "the favor shown to charities should not be carried to the point of overriding the plainly expressed limits of a gift, whether the duration is limited in so many words or not." Stratton v. Physio-Medical College, 21 N.E. 874, 875 (Mass. 1889).

1. Comfort v. Higgins

The leading case on the subject of charitable trusts is Comfort v. Higgins, 576 S.W.2d 331 (Mo. banc 1978). In this case, the Supreme Court of Missouri made a determination that the trial and appellate courts were incorrect in finding that the settlor had a general charitable intent in the creation of her trust.

In Comfort, the settlor created a charitable trust during her lifetime by way of a deed, which conveyed a parcel of real property to Jennie C. Higgins, and provided that upon the settlor's death, Jennie C. Higgins would make certain that the St. Louis Women's Christian Association and its auxiliary, Memorial Home, Inc., established on the real property a Home for aged men and their wives. Comfort v. Higgins, 567 S.W.2d

331, 333-34 (Mo. banc 1978). The settlor stated that her purpose was to keep in living memory the record of her father's generosity, and she further conditioned that the property conveyed be forever known as the "Baxter Protestant Memorial." Id. at 333.

As is true with the present case, the trust construed in Comfort was an inter-vivos trust without a reverter provision. Id. at 333-34. The Attorney General, also a party in that case, argued for the application of the *cy pres* doctrine. Id. at 335. Testimony adduced at trial revealed that for a significant amount of time the trustees had failed to follow the instructions of the trust. Id. at 334-35. The trial and appellate courts held that the purpose of the trust had become impossible or impracticable, that the settlor had a general intent in forming the trust instrument, and applied the doctrine of *cy pres*. Id. at 332-33.

After the case was transferred to the Supreme Court of Missouri upon certification by a member of the Eastern District Court of Appeals, the Supreme Court reversed the trial and appellate courts' holdings and found that because the grantor evinced a specific rather than a general charitable intent, the trust corpus had to revert to the heirs of the grantor. Comfort v. Higgins, 576 S.W.2d 331, 339 (Mo. banc 1978).

The main focus of the Supreme Court's opinion in Comfort was on how to determine whether the settlor created a trust with a specific or a general intent once there was a finding that the charitable trust purpose had failed. The Supreme Court distinguished the facts of Comfort from existing case law where the determination was made that a settlor had a general charitable intent.

First, The Missouri Supreme Court has stated that a testator evinced a specific intent:

> [W]here it is determined that the settlor's intent was to aid that kind of charity only in a particular way or by a particular method or means, that he intended to make no gift to that general kind of charity other than by the specified particular means failed, the gift and that the corpus of the trust estate could no longer be used for the general or kind of charity he desired to assist.

Comfort v. Higgins, 576 S.W.2d 331, 338 (Mo. banc 1978); *citing to* Ramsey vs. Brookfield, 237 S.W.2d 143, 146. (Mo. 1951).

The Supreme Court then distinguished the facts of Ramsey where it found a general charitable intent even in the face of specific language by the testator that the residue of her estate pass to a city for "the sole purpose of building and equipping and maintaining a city hospital." Comfort at 338. Looking to the specific and unambiguous language of the testator's estate plan, the Court stated that the paramount difference in Ramsey from that of Comfort was that the testator in Ramsey specifically excluded her heirs in her will. Id. The Court in Ramsey looked within the four corners of the document and pointed out that the testator, " . . . expressly stated that it was her will that none of her nieces, nephews, great nieces and great nephews have any benefit from her estate. . . The language . . . is conclusive that she intended the residue to go into the trust fund and that there were to be no reverter rights in her heirs at law." Id, at 862-863 (*emphasis added*). The inescapable conclusion is that had she not expressly stated that it

was her will to prevent her heirs from taking, then the very restrictive language of for "the sole purpose of building and equipping and maintaining a city hospital" would have been given effect. Furthermore, the Court in Ramsey found that the trust did not fail because it was not evident that it had become impractical or impossible to carry out the trust purpose, so the Supreme Court in Ramsey did not even apply *cy pres* to the trust corpus in that case. Id. In the case at bar, Ramsey is not inconsistent with the holding of the appellate court decision as contended by respondent in its Application for Transfer.

Also in Comfort, The Supreme Court acknowledged the statement in Thatcher v. Lewis, 76 S.W.2d 677, 683 (Mo. 1934) that there is a general charitable intent when the intent is to apply the gift to a continuing problem. However, the Court stated that this language was overly broad and that the true inquiry should rather be whether the settlor in the creation of his trust meant to benefit all affected by a continuing problem, or only certain persons. Comfort v. Higgins, 567 S.W.2d 331, 338 (Mo. banc 1978).

The Supreme Court in Comfort also noted that courts are more willing to find a general intent where a trust has been successfully implemented for a long period of time. Id. at 337. This was the case in Thatcher v. Lewis, 76 S.W.2d 677 (Mo. 1934). The settlor in Thatcher created a charitable trust in his will for the very broad purpose of establishing upon his death, "a fund [be established] to furnish relief to all poor immigrants and travelers coming to St. Louis on their way, bona fide, to settle in the West." The will was executed in 1849, and the settlor died in 1851. Id. at 678-79. The settlor's trust was successfully implemented by the trustees for at least seven decades, and

it was at that point that the heirs brought suit not for the construction of the trust, but for its destruction. Id. at 678-79, 684.

Citing to Thatcher again and also to Levings v. Danforth, 512 S.W.2d 207 (Mo. App. W.D. 1974), the Supreme Court in Comfort discussed the possibility that an absence of a reverter clause could be a factor in determining if the settlor evinced a general intent, but that this was usually found when the settlor specifically excluded his or her heirs or when other gifts were made to the heirs. Comfort at 338. However, the Supreme Court found that where there is an inter-vivos trust, the inference cannot be drawn that the settlor intended to exclude his or her heirs, and therefore, this evidence cannot be used to support a finding of general intent, further distinguishing Thatcher from the facts in that case. Id. at 339. Furthermore, not only does the limiting language of the trust evince specific intent, but the settlor's decision to make a gift in trust in and of itself evinces specific intent. Id.

2. Vollmann vs. Rosenburg

While Vollmann v. Rosenburg is not binding authority on this Court, it was so on the trial court and is instructive because of the similarity of the language used by the settlor in that case to the language used by Dr. Kimbrough. In Vollmann v. Rosenburg, the settlor created a testamentary trust instrument that stated:

> . . .[Upon my death] I bequeath [the residue] of my estate *to the Salvation Army, to be used, in perpetuity as a Rest Home or Children's Camp, and aforesaid property never to be sold . . .*

Id. at 491 (emphasis added).

The trust did not contain a reverter provision if the purposes of the trust were to fail. Id. The settlor died in 1977. Id. Sometime around 1992 the Salvation Army determined that it was no longer feasible to use the property as a rest home or children's camp. Id. The heirs brought suit claiming that the settlor had a specific intent in creating the trust, the trust purposes had become impossible or impracticable, and that therefore, the corpus of the trust should revert to the heirs at law. Id. at 491-92. The trial court agreed that the settlor evinced a specific intent and that the trust had therefore failed. Id. at 492. The trial court found, however, that if there were a valid residuary legatee who could take the corpus, then the corpus would pass to that residuary legatee. Id. William Rosenburg was the residuary legatee capable of accepting the corpus, and because he had assigned his interest to St. Albans, the court quieted title in St. Albans and sustained its motion for judgment on the pleadings. Id.

The Court of Appeals for the Eastern District of Missouri affirmed the trial court's holding that the settlor evinced a specific intent and that the corpus of the failed trust correctly passed to the residuary legatee, as the residuary clause of the will remained valid. Id. at 492. The Court acknowledged that by her will the settlor had created a charitable trust, and that the trust had failed. Id. Making no mention of an analysis of extrinsic evidence of intent, the Court stated that, "the language of the will demonstrates [the settlor] evinced a specific intent in creating the trust." Id. Instead, the Court relied solely on the restrictive language of the trust in holding that the settlor evinced a specific intent.

C. Applying the Current Precedent to the Case at Hand Dictates a Finding That Dr. Kimbrough Had a Specific Charitable Intent in the Creation of His Trust.

Applying the law, as set forth in Comfort and Vollmann to the facts of the case at bar, dictates a finding that Dr. Kimbrough had a specific charitable intent when he created his Trust.

1. Dr. Kimbrough's Trust is more Restrictive than Trusts in Vollman and Comfort.

In Comfort v. Higgins, 576 S.W.2d 331 (Mo. banc 1978), the settlor created a trust that read:

> . . . [the trustees are to] establish upon said premises, under its present rules and regulations, a farm Home for aged men and women and aged men and their wives, and to that end and purpose the [trustee] shall do all acts and things necessary to provide shelter and subsistence from the cultivation of the soil, or otherwise, to ameliorate the condition of the poor, weak, aged and helpless, as is now presently carried on in the said auxiliary known as the 'Memorial Home' . . . and upon further condition that the property herein conveyed and the establishment of the same be forever known as the 'Baxter Protestant Memorial.'

Id. at 333. The Court found that the settlor had evinced a specific intent. Id. at 339.

In Vollmann v. Rosenburg, 972 S.W.2d 490 (Mo. App. E.D. 1998), the settlor created a trust instrument that stated:

> . . .[Upon my death] I bequeath [the residue] of my estate *to the Salvation Army, to be used, in perpetuity as a Rest Home or Children's Camp, and aforesaid property never to be sold . . .*

Id. at 491 (*emphasis added*). The Court found that the settlor had evinced a specific intent. Id. at 492.

Dr. Kimbrough's trust provided that his niece and nephews receive a life estate in the trust corpus with liberal encroachment and advancement provisions, then after their deaths:

> the trust estate shall be paid over and distributed free from trust *unto Washington University, St. Louis, Missouri, for the exclusive use and benefit of its Dental Alumni Development Fund.*

(L. F. at 287; Ex. 1) (*emphasis added*).

Analyzing the comparative language of the trusts above, the wording of Dr. Kimbrough's trust presents a more convincing case that he had a specific intent in creating his trust than the trusts in either Comfort or Vollmann. In Comfort the settlor created a trust instrument that was to ". . . do all acts and things necessary to provide shelter and subsistence from the cultivation of the soil, or otherwise, to ameliorate the

condition of the poor, weak, aged and helpless . . ." Comfort v. Higgins, 576 S.W.2d 331, 334 (Mo. banc 1978). The poor, weak, aged and helpless still exist in Missouri and around the world and could benefit from financial help. However, because the settlor included unambiguous and restrictive language concerning the trust the Court found that the settlor evinced a specific intent and thus *cy pres* could not be applied. Id. at 339.

In Vollmann the settlor intended that her gift be given to the Salvation Army to be used 'in perpetuity' for the benefit of children and the aged and did not provide a for a reversion in case the trust failed. Vollmann v. Rosenburg, 972 S.W.2d 490, 491 (Mo. App. E.D. 1998). The Salvation Army still exists, as do children and the aged. The children and aged could still benefit from financial assistance. However, because the settlor included limiting, restrictive language within the trust, the Court held that the settlor had evinced a specific intent, and therefore the doctrine of *cy pres* could not be applied. Id. at 492.

Similarly, Dr. Kimbrough provided that the gift be given to Washington University for the *exclusive use and benefit* of the Dental Alumni Development Fund. (L.F. at 287; Ex. 1.) Although Washington University exists today, as did the Salvation Army in the Vollmann case, the Dental Alumni Development Fund and the purposes for which it was created (continuation and prestige of the Dental School) do not. The Dental School has not continued to operate. It has no prestige. It is gone; it has been closed permanently. (Tr. at 33-34.)

2. Rules of Construction Dictate That if Language is Direct it Should be Ascribed its Ordinary Meaning.

Where language is direct and not artful there is no reason to ascribe a meaning to words used other than their ordinary meaning. Curators of University of Missouri v. University of Kansas City, 442 S.W.2d 66, 70 (Mo. banc 1969). The word "exclusive", is defined by Webster's New International Dictionary as, "1 a : excluding or having the power to exclude (as by preventing entrance or debarring from possession, participation, or use) b : limiting or limited to possession, control, or use (as by a single individual or organization or special group or class)." WEBSTER'S NEW INTERNATIONAL DICTIONARY 793 (3d Ed. 2002). At the time Dr. Kimbrough amended his Trust in 1955 to provide for the Dental School upon the death of his kin, the word "exclusive" was defined as, "1. excluding or having over to exclude, or prevent entrance, debar from possession, participation, or use, etc.; as, *exclusive* bars or regulations; limiting or limited to possession, control, or use by a single individual, organization, etc., or by a special group, class, etc..." WEBSTER'S NEW INTERNATIONAL DICTIONARY 890 (2d Ed. 1946). The restrictive language of Dr. Kimbrough's trust evinces a specific intent to benefit a certain Fund, the purpose of which cannot be fulfilled without the existence of the Dental School.

Nowhere in Dr. Kimbrough's trust instrument does the trust speak of any broad charitable purpose that he meant to assist, as the trial court claims. (L.F. at 291.) Rather,

Dr. Kimbrough designated a specific Fund, which was established by the alumni of the Dental School for ensuring the continued operation of the Dental School at a high level. (Tr. at 68-69; Ex. 15.) It was clear that Dr. Kimbrough only intended to benefit the continuing operation of the Dental school, and the faculty and students of the Dental School. The Dental Alumni Development Fund existed at the time of Dr. Kimbrough's death, as did the Dental School. (Tr. at 74-75; Ex. 15.) There was no indication at the time of Dr. Kimbrough's death that Washington University planned to close the Dental School, which virtually supported itself and had its own building, and existed even before the birth of Dr. Kimbrough. (Tr. at 185, 261, 353-356). Unlike the broad charitable purposes of the trusts in Comfort and Vollmann, the charitable purpose of Dr. Kimbrough's trust, the Dental School, has ceased to exist and will not exist in the future.

3. The absence of a reversion does not create a general intent

Even though Dr. Kimbrough did not provide a reversion in his trust document, like Vollmann, Dr. Kimbrough did provide that Margaret Derrick was the residuary legatee of his Last, Will, and Testament. When a trust and will form part of the same plan, the documents must be construed together. Lehr v. Collier, 909 S.W.2d 717, 723 (Mo. App. S.D. 1995). Dr. Kimbrough's Will provided that, his niece, Margaret Derrick take as the residuary legatee. (Ex. 4.) This was part of Dr. Kimbrough's evolving estate plan created by him with the assistance of his lawyer and friend, Clarence A. Weindel, and a change from a former will. (Ex. 4.) It is evident that Dr. Kimbrough intended the Trust corpus to

pass specifically to benefit his Dental School, and if the Trust could not benefit his Dental School, the trust would fail, and upon its failure he would not want the Trust corpus to pass to a University that was responsible for the dismantling of his alma mater, but to benefit his family.

Respondent misstates the law in its Application for Transfer, saying that the doctrine of *cy pres* is "applied in all cases save those in which the grantor specifically intended that the trust terminate if it could not achieve the original objective." As stated previously, when a testator makes a charitable gift he or she does not expect the gift to fail, but the inquiry is what the testator specifically intended with regard to his gift. Levings vs. Danforth, 512 S.W.2d 207, 211 (Mo. App. W.D. 1974), citing to 4, Scott, Trusts, Section 399.2 (3rd ed. 1967).

If in the creation of a charitable trust the testator provides for an alternative disposition of the trust in the event the charity ceases to exist, then there is no question as to the intent of the testator. However, as in the instant case, if the testator does not specifically provide for an alternative disposition in the charitable trust itself, then it is up to the Court to create a reversion in the testator's heirs based on the evidence as presented. Dr. Kimbrough contemplated that the Dental School would survive in perpetuity and not be closed and carved up by Washington University. A Court searching for intent, "must always keep in mind that the intention of the testator is the guiding principle; that his blood relatives, his heirs, are favorites of the law and entitled to first consideration in doubtful expressions; that a testator, however clear of intellect,

cannot always foresee and provide for contingencies that may arise to hamper interpretation." Coleman v. Haworth, 8 S.W.2d 931, 932-33 (Mo. 1928).

While it is clear within the reason and experience of Dr. Kimbrough that he knew that all human individuals would certainly die and cease to be, it is quite probable that he would not anticipate that the venerated Dental School over 100 years of age would cease to be. Furthermore, during the campaign for donations to the Dental Alumni Development Fund, the *Dental Journal* provided templates for donations and offered the use of specific language to donors to provide for Washington University in the event that the Dental Alumni Development Fund ceased to exist; however, Dr. Kimbrough, who revised his Trust and Will during said fund-raising campaign, made a conscious decision not to use this language in his estate plan. (Tr. at 103; Ex. 15; Intervenor's Ex. 6.) Instead, Dr. Kimbrough used the strongest language imaginable, to wit, '**exclusive** use and benefit" to provide for the continued operation of the Dental School through the Dental Alumni Development Fund.

4. The creation of an inter-vivos trust is evidence of specific intent.

Dr. Kimbrough created an inter-vivos charitable trust. He did not decide to give a gift outright, instead he intended that the income from the trust be used to support his family (niece and nephew for their lives). Dr. Kimbrough created his trust in 1945, he only amended this trust twice. The first amendment, which was made in 1954 prior to the time that Dr. Kimbrough added the charitable language to his trust giving rise to this suit, and was created simply to make an apportionment of any taxes assessed against his

estate. (Ex. 1.) In 1955, after the dental alumni fundraising campaign and the creation of the Dental Alumni Development Fund, Dr. Kimbrough amended his trust once again to provide a life estate in his niece and nephews. At all times from the inception of the trust in 1945 to the very last amendment in 1955, Dr. Kimbrough's Trust authorized the Trustees to encroach upon the principal of the trust estate for the use and benefit of the beneficiaries of the trust to provide for their "proper maintenance and support, or to provide against any emergency which may arise affecting them occasioned by sickness, accident, ill health, misfortune or otherwise." (Ex. 1.) It further authorized the Trustees to "advance such sum or sums out of the principal of the trust estate for the use and benefit of the beneficiaries as they shall consider reasonable and proper under the circumstances and make such advancement from time to time when they believe it proper to do so and for the best interests of said beneficiaries." (Ex. 1.) Finally, Dr. Kimbrough consciously chose to make a final amendment to his Trust in 1955 to provide the trust estate be continued in equal shares for the respective use and benefit of his two nephews and his niece, and the survivors or survivor of them, and to provide that if any of the three died, the remaining beneficiary or beneficiaries would receive the share of the deceased in proportion that their respective original shares bore to each other. (Ex. 1.) The trust language stated above is evidence that Dr. Kimbrough might have anticipated the depletion of the corpus by his family members, especially considering his own age when he made this amendment.

Dr. Kimbrough also provided for Louise in his will by bequeathing her $5,000.00, which supports the fact that he wished to provide for his heirs. (Tr. at 50; Ex. 4.) Although he did not provide for Elizabeth in his estate plan, he did not specifically exclude her, as the heirs were specifically excluded in Ramsey v. City of Brookfield, 237 S.W. 2d 143 (Mo. 1951).

Moreover, the trust corpus has never been used for the benefit of the Dental Alumni Development Fund. At all times prior to Margaret Derrick's death, the funds from the trust were used for only the individual beneficiaries of Dr. Kimbrough. Unlike Thatcher, where the settlor's trust was successfully implemented by the trustees for at least seven decades to benefit travelers in St. Louis on their way to settle the West, Dr. Kimbrough's trust never benefited the Dental School because like Ramsey v. City of Brookfield the provisions of the trust were not certain to vest or fail until the death of the life beneficiaries. Ramsey vs. Brookfield, 237 S.W.2d 143, 148 (Mo. 1951)

Although Dr. Kimbrough did not have any children, nor did he ever marry, he provided specifically for the only family he knew, the people who took care of him and knew him as Uncle Joe. Had the trial court in the instant case recognized the precedent as set forth in Vollmann and Comfort, it would not have found that Dr. Kimbrough evinced a general intent. (L.F. at 303.) The true inquiry should rather be whether the settlor in the creation of his trust meant to benefit all affected by a continuing problem, or only certain persons. Comfort v. Higgins, 567 S.W.2d 331, 338 (Mo. banc 1978). It is clear that Dr. Joseph B. Kimbrough specifically intended only to provide for the

continuation of his Dental School through the Dental Alumni Development Fund. When the purpose of the Dental Alumni Development Fund ceased to exist, as did the Dental School, Dr. Kimbrough's gift could no longer be used as he specifically intended, and according to precedent of the state of Missouri, the gift must revert to Dr. Kimbrough's heirs at law. Comfort v. Higgins, 576 S.W.2d 331, 338 (Mo. banc 1978). The trial court's conscious disregard for Missouri precedent and the holdings of both Comfort and Vollmann is a misapplication of the law of this State, and the Judgment of the trial court should be reversed.

D. Precedent in Another Jurisdiction That Applies the Cy pres Doctrine in the Same Manner as Missouri Courts is Persuasive in the Instant Case.

The trial court undoubtedly erred in failing to follow Missouri precedent. Appellants' also presented to the trial court a case from the Kansas Court of Appeals in their Legal Memorandum in Support of Judgment in Favor of Plaintiffs. (L.F. at 247-48.) The law of Kansas is persuasive because Kansas courts apply *cy pres* in the same manner as Missouri courts and the extrinsic facts of the instant case are clearly analogous to the facts of In Re Estate of Coleman, 584 P.2d 1255 (Kan. Ct. App. 1978) which should have been given consideration. In Coleman, the testator created a residuary clause in his last will and testament in 1965 leaving two-fifths of his estate to the College of Emporia, a Presbyterian educational institution located in Emporia, Kansas. Id. at 1258. The issue that gave rise to the appeal was that the College of Emporia closed in 1973, prior to the settlor's death in 1975. Id. The testator had not changed the language of his will. Id.

In Coleman, the Way College, which bought the physical facilities of the College of Emporia and purchased its corporate existence, requested that the gift pass to them as the successor of College of Emporia, although it was not in anyway affiliated with the Presbyterian Church, it was not an accredited school, and it was not authorized to grant degrees. Id. at 1259. The Court first found against the Way College, reasoning that it was clear from the settlor's bequest to "a Presbyterian educational institution," that he meant to limit his gift. Id. at 1260.

Additionally, a Presbyterian College in Kansas asked for the application of *cy pres* in its favor. Id. at 1258. The Appellate Court stated, "the fundamental concept of the doctrine is that a donor may have a general charitable intent, and that the particular charitable institution he has designated as recipient of the gift is only an agent for effectuating that gift." Id. at 1261. The Court found that the question was whether the testator had a general charitable intention to benefit Presbyterian higher education, or whether he had a narrow, special intention to benefit the College of Emporia, and no other Presbyterian college. Id. at 1262. The Presbyterian College argued for a general intent based on the foregoing:

1. The will did not contain a reversionary provision;

2. The gift was made to the University by name and without specification, reservation or limitation as to its use;

3. The testator bequeathed the bulk of his estate to charities;

4. The testator made specific devises to his family, which indicated that what he did not set aside to his family, he wanted to pass to charity; and

5. Other will provisions indicated the settlor was interested in Presbyterianism; and

6. That the settlor had no special personal relationship, such as a faculty member or alumnus, to the College of Emporia.

Id. at 1262-63.

The Appellate Court found that in spite of the evidence in favor of a general charitable intent, the one, ***crucial*** factor that the trial court relied on was that College of Emporia conducted a fund drive in the sixties, just prior to the execution of the settlor's will. Id. at 1262 (*emphasis added*). Consequently, the Appellate Court found that the evidence presented at trial and the will itself supported the trial court's determination that the settlor specifically intended the two-thirds residue to benefit the College of Emporia, and that it then could not apply the doctrine of *cy pres*. Id. at 1263.

Although Coleman is not legal precedent in the State of Missouri, this case is extremely persuasive with regard to the characterization of the settlor's intent as either general or specific. The finding that the testator in Coleman had a specific intent in the creation of his will was based on evidence that is similar, but not as strong as the facts in the instant case.

1. Dr. Kimbrough did not have a specific reversion in his Trust in the event that the purpose of the Trust failed. (Ex. 1.) However, he did provide that his niece Margaret take as residuary legatee. (Ex. 4.)
2. Dr. Kimbrough did use limiting language that specified that Washington University use the trust corpus upon the death of his niece and nephews for the "exclusive use and benefit" of the Dental Alumni Development Fund, which has ceased to exist, as the Dental School has ceased to exist.
3. The only other provision for a charity in his estate plan was an out-right gift of $2,000.00 to the League of Hard of Hearing. (Ex. 1, 4.)
4. Although Dr. Kimbrough made a specific bequest to Appellant Louise Obermeyer—an outright gift of $5,000.00, more than double the $2,000.00 to the League of Hard of Hearing--he did not provide a bequest to Appellant Elizabeth Salmon. (Ex. 4.)
5. Neither Dr. Kimbrough's Last Will and Testament nor his Trust provided for any other Dental School or to an institution of higher education generally. (Ex. 1, 4.)
6. Unlike the testator in Coleman, Dr. Kimbrough was an alumnus and former faculty member of the Dental School. (Ex. 14.)

In Coleman, the crucial fact, which the trial court relied on and the Appellate Court endorsed, in determining that the testator had a specific intent was that during the time that the will was created, there was a substantial fundraising campaign for the continuing operation of the College of Emporia. In the present case, in 1953 a group of

alumni of the Dental School met and organized a fund raising campaign known as the Dental Alumni Development Fund in response to the financial needs of the Dental School. (Ex. 15.) The Dental School Faculty Meeting Minutes of March 17, 1954 indicated that the Dental School was soliciting funds from alumni for its continued support. (Tr. at 135-136, Ex. 37.) In May of 1954, Dr. Kimbrough gave a gift of $200.00 to the Dental Alumni Development Fund. (Supp. L.F. at 79.) Prior to May of 1954, there is no evidence of any charitable contributions made by Dr. Kimbrough. (Supp. L.F. at 31.) In November of 1954, the Dean of the Dental School wrote an article in the Dental Journal publishing the purpose of the Fund and soliciting contributions to the Fund. (Tr. at 65 - 70; Ex. 15.) In May of 1955, the Dental Journal reported, "the Development Fund is growing to a very encouraging extent. Prospects are that the increased *number* of contributions this year will be significant." (Tr. at 70; Ex. 15.) Four months after this report, Dr. Kimbrough made the final amendment to his Trust to provide that after the deaths of his beneficiaries, the trust estate be paid over to Washington University for the exclusive use and benefit of the Dental Alumni Development Fund. (Ex. 15; Ex. 1.)

Obviously, the trial court was not required to look to the law of Kansas to make a determination that Dr. Kimbrough had a specific charitable intent when he created his Trust. However, it was the duty and obligation of the trial court to apply Missouri precedent to the facts of the instant case, and the Coleman case is illustrative and its well-reasoned opinion is consistent with Missouri's law as articulated in Comfort and Vollmann.

Washington University's permanent closure of the Dental School eliminated the purpose for which the trust was created and caused it to fail. Because Dr. Kimbrough chose to benefit his alma mater, the Dental School, and not Washington University, and because he did not demonstrate a general charitable intent, i.e., to benefit charities generally, the case law of the State of Missouri requires the corpus to revert to his heirs.

II.

The trial court erred in concluding that Dr. Kimbrough's charitable trust had a general purpose because said finding is against the weight of the evidence in that the substantial evidence in this case (both intrinsic and extrinsic) prove that Dr. Kimbrough 's trust had a specific purpose to benefit the Dental School exclusively.

The Missouri Supreme Court has stated that a testator evinced a specific intent:

> [W]here it is determined that the settlor's intent was to aid that kind of charity only in a particular way or by a particular method or means, that he intended to make no gift to that general kind of charity other than by the specified particular means failed, the gift and that the corpus of the trust estate could no longer be used for the general or kind of charity he desired to assist.

Comfort v. Higgins, 576 S.W.2d 331, 338 (Mo. banc 1978).

Dr. Kimbrough specifically intended his trust to benefit the Dental School, his alma mater, and not Washington University as a whole. All of the evidence produced prior to or during trial supported the assertion Dr. Kimbrough evinced a specific intent when he created the trust. Other than pure speculation, Respondents provided no evidence to the contrary. Additionally, the trial court relied upon the wrong will and erroneous facts in its construction of Dr. Kimbrough's intent. (L.F. at 290-91.) To begin to understand Dr. Kimbrough's state of mind it is necessary to know why Dr. Kimbrough created a trust to benefit the Dental School.

Dr. Kimbrough was born in 1870. (Tr. at 48.) He began his dental education at the Missouri Dental College in 1890, which was the first dental school west of the Mississippi and not associated with Washington University at that time. (Tr. at 31, 134; Ex. 14.) It was during his education that the Missouri Dental College was acquired by Washington University. Dr. Kimbrough later served as a member of the faculty of the Dental School. (Ex. 14.)

During the 1950's, through the Dental Journal and other avenues, the Dental School alumni were solicited by Dental Alumni Development Fund-raising efforts for the Dental School. (Tr. at 135-136; Ex. 37, Ex. 15.) In 1953, the Dental Alumni Development Fund was created by alumni of the Dental School who were stimulated to do this by their knowledge of the financial needs of the Dental School. (Ex. 15.) In May of 1954, Dr. Kimbrough, then 84 years old, wrote a $200 check to Washington University for the Dental Alumni Development Fund. (Supp. L.F. at 79.) This was even before the Dental Journal publicized the Dental Alumni Development Fund in its November 1954 edition when it enunciated the two-fold purpose. (Ex. 15.) The first purpose was to provide financial assistance to the continued operation of the Dental School; and the second purpose was to boost morale and prestige of the School and its faculty by sending a message that the alumni are behind them and interested in their constant improvement. (Ex. 15.) The purposes of this Dental Alumni Development Fund were dependent upon only one thing, the existence of the Dental School. This Dental Alumni Development Fund was in existence until at least 1963. (Tr. at 74-75.) Dr. Kimbrough died on

December 11, 1963. (Ex. 5.) The Dental School, its faculty, and students ceased to exist in 1991. (Tr. at 32-34, 40; Ex. 16, 25.)

A. The Intrinsic Evidence Supports the Proposition That Dr. Kimbrough Specifically Intended to Assist the Dental School Only and Not Washington University.

1. The Restrictive Trust Language Itself Is Evidence of Specific Intent.

The clearest expression that Dr. Kimbrough's intent was specific is the language of his trust instrument. The wording of Dr. Kimbrough's amended trust reads:

> [Upon the death of surviving family members] the property then constituting the trust estate shall be paid over and distributed free from trust *unto Washington University, St. Louis, Missouri, for* ***the exclusive*** *use and benefit of its Dental Alumni Development Fund.*

(Tr. at 25-26) (*emphasis added*).

Missouri courts have held that, "only when the language of the will is ambiguous or wanting in clarity is the court authorized to consider extrinsic evidence to ascertain the testator's intent." In re Morrissey v. St. Louis Union Trust Co., 684 S.W.2d 876, 878 (Mo. App. E.D. 1984). Dr. Kimbrough's trust is in plain language. The trust was amended to exclusively benefit the Dental Alumni Development Fund. The only purpose of that Dental Alumni Development Fund was the continued operation of the Dental School. Therefore, according to the plain language within the four corners of the estate

documents, Dr. Kimbrough evinced a specific intent and the doctrine of *cy pres* cannot be applied.

2. The Fact That Dr. Kimbrough Left His Money in Trust, Rather Than an Outright Gift, is Evidence of His Specific Intent.

Dr. Kimbrough's wording is explicit. The restrictive language is *for the exclusive use and benefit* of the Dental Alumni Development Fund. When such restrictive language is used and said language is found within a trust, rather than in an outright gift, this is evidence of the settlor's specific intent. Comfort v. Higgins, 576 S.W.2d 331, 339 (Mo. banc 1978). It is also significant that every time the Dental Alumni Development Fund was mentioned in the estate documents (the Trust, the 1959 Will, and the Last Will and Testament) it was preceded by the restrictive language *'for the exclusive use and benefit of*." Dr. Kimbrough did not leave a gift to the Dental School that was to take immediate effect upon his death. Instead, he provided for his closest living heirs and after their passing and for the corpus to be distributed for the exclusive use of a fund to preserve the Dental School if any funds remained. Kimbrough even provided encroachment rights and advancement rights to these heirs during their lifetime. (Ex. 1.)

Dr. Kimbrough did not direct the distribution of his principal to an endowed professorship or to create a chair in his name or to help the study of dental medicine in general or for the treatment of malocclusions or for research. These charitable avenues were available to Dr. Kimbrough when he created his trust. To the contrary, Dr. Kimbrough directed that his principal be for *the exclusive* use and benefit of the Dental Alumni Development Fund. That Dental Alumni Development Fund's purpose was to

ensure the continued operation of the Dental School. The fact that Dr. Kimbrough created a trust to carry out this exclusive purpose is further evidence that he specifically intended to assist the Dental School.

3. The trial court made material misstatements of the Intrinsic Evidence that if properly stated, prove Dr. Kimbrough had a specific purpose to benefit the Dental School exclusively.

The trial court in its opinion misstated the provisions of Dr. Joseph B. Kimbrough's Last Will and Testament, which was offered as part of the certified copy of the entire probate file of Dr. Kimbrough, which was previously filed by the court on October 22, 2001, and admitted into evidence at trial. (L.F. at 288; Tr. at 20-22; Ex. 4.) Appellant Louise Obermeyer even read the pertinent language of Dr. Kimbrough's Last Will and Testament into the record. (Tr. at 22.) Contrary to the Will's instruction, the trial court in its opinion stated in Paragraph 8 of the judgment:

> Dr. Kimbrough also created a Last Will and Testament. The Will also contained language granting to Washington University the rest and remainder of Dr. Kimbrough's estate. The Will did not contain a 'reversionary' provision providing for an alternate disposition of the estate.

(L.F. at 288).

Louise's mother, Margaret Derrick, not Washington University is in fact the residuary legatee under Dr. Kimbrough's Last Will and Testament:

> All the rest, residue and remainder of my property and estate both real and personal, of every kind and description and wheresoever situated of which I may die seized or possessed. or to which I may be entitled at my death, I give, devise and bequeath unto my said niece, Margaret Derrick, if living, otherwise I give, devise and bequeath the same unto Washington University, of Saint Louis for the exclusive use and benefit of its Dental Alumni Development Fund.

(Tr. at 22; Ex. 4) (*emphasis added*). The trial court also stated incorrectly that: "Under the Will, Dr. Kimbrough provided for the Plaintiffs in this action by leaving each of them $5,000.00." (L.F. at 288.)

Although Dr. Kimbrough provided in his Last Will and Testament a gift to Appellant Louise Obermeyer, he did not bequeath any such gift to Appellant Elizabeth Salmon. He also did not specifically exclude either of the Appellants from his Last Will and Testament or his Trust. Nor did the will provide any bequest for the benefit of Washington University, as stated by the trial court. Washington University was never in any of the documents before the court as a beneficiary, but was merely a trustee to administer funds "for the exclusive use and benefit" of the Dental Alumni Development Fund.

If the language before the Court for its construction is direct, not artful, there is no reason to ascribe to those words meaning other than their ordinary, commonly understood meaning. Curators of the University of Missouri vs. University of Kansas City, 442 S.W.2d 66, 70 (Mo.banc 1969). The trial court applied misstated facts to support a

finding that Dr. Kimbrough had a general intent when he created his Trust. This was simply not the intrinsic evidence presented at trial. A simple reading of the ultimate Last Will and Testament of Dr. Kimbrough proves that the trial court's finding was against the weight of the evidence and reversible error.

At trial, Appellants presented the trial court with a copy of Dr. Kimbrough's TRUE Last Will and Testament that was signed in 1962 (Tr. at 22; Ex. 4.) that named Margaret Derrick as the residuary legatee of his estate. (Tr. at 24; Ex. 2.) Then, Appellants presented the trial court with Dr. Kimbrough's 1959 Last Will and Testament, that was revoked by the 1962 Last Will and Testament to show Dr. Kimbrough's evolving estate plan. (Tr. at 24; Ex. 4.) It was made clear during Appellant Louise Obermeyer's direct examination by her attorney and by the Attorney for the Intervenor that the 1962 Will was indeed Dr. Kimbrough's Last Will and Testament. (Tr. at 21-24, Tr. at 42-44; Ex. 4.) Had the trial court recognized this material matter of fact it could not have found that Dr. Kimbrough had a general intent when he created his Trust. The fact that Dr. Kimbrough amended his Will to name his niece, Margaret Derrick, shows his intent to provide for his family.

Dr. Kimbrough's own words require the construction of his will and trust as one document. In his will Dr. Kimbrough stated:

> [B]efore the execution of this Will I had advice and counsel in relation thereto from Mr. Clarence A. Weindel… that Mr. Weindel evolved with my estate plan, is familiar with my testamentary intentions, and prepared this Will, and the Indenture of Trust hereinbefore mentioned…

(Ex. 4). In the same breath Dr. Kimbrough states that his estate plan and testamentary intent is involved with his will and his indenture of trust. Clearly, Dr. Kimbrough intended that these two documents should be construed together. As a result he created a reversionary interest in his niece, the mother of one of the plaintiffs. Missouri precedent also holds that, "Missouri courts generally use the same rules for construing both trusts and wills... When...the trust and will form parts of the same plan, the documents must be construed together." Lehr v. Collier, 909 S.W.2d 717 (Mo. App. S.D. 1995). Dr. Kimbrough explicitly states that his will and trust are part of the same estate plan and they should be construed together. (Ex. 4.) Construing Dr. Kimbrough's Trust and Last Will and Testament together, it is clear that if his Trust were to fail his intention was that the Trust Corpus become part of his residuary estate. Since Margaret Derrick, was his residuary legatee under his Last Will and Testament and alive at his death, the trust corpus should be administered by Appellant Louise Obermeyer as personal representative of her mother Margaret Derrick's estate, who may distribute said trust corpus according to the terms of the Family Settlement Agreement signed by both Louise and Elizabeth. (L.F. at 240.)

B. The Extrinsic Evidence Supports the Proposition That Dr. Kimbrough Specifically Intended to Assist the Dental School Only and Not Washington University.

1. The Dental Alumni Development Fund Was Created for the Sole Benefit of the Dental School.

The exclusive and specific object of Dr. Kimbrough's charitable trust was the Dental Alumni Development Fund. (Ex. 1.) The stated purposes of the Dental Alumni Development Fund related exclusively to the Dental School and not the University. (Ex. 15.) By disregarding the two-fold purpose of the Dental Alumni Development Fund, the sole evidence of its purpose, the trial court disregarded Dr. Kimbrough's specific intent and his testamentary plan.

Testimony elicited from Dr. Gilster, a dental school alumnus, stated that the Dental School alumni always had an extremely strong interest in the Dental School. (Tr. at 66-67.) The foundation of the Dental Alumni Development Fund was based on a meeting of , "[A] group of local alumni, stimulated by their financial needs of the Dental School." (Ex. 15.) Dr. Kimbrough's gift to the Dental Alumni Development Fund in May of 1954, when he was 84 years old, is his first charitable gift in the record, and was made even before the published report of the foundation of the fund in the November 1954 issue of the *Dental Journal*. Id. Approximately one year later, on September 23, 1955, Dr. Kimbrough amended his trust to grant the principal of his trust for the exclusive use and benefit of this Dental Alumni Development Fund. (Ex. 1.) Prior to the article in the Dental Journal, the principal of Dr. Kimbrough's trust was to be distributed to his relatives. The purpose of the Dental Alumni Development Fund, as stated in the article and testified to at trial, was the continued operation of the Dental School and a boost in morale for the Dental School and its faculty. (Ex. 15; Tr. at 66-67.) No other purpose or goal of the Dental Alumni Development Fund is present in the record, nor was any alternative purpose suggested at any point in this litigation. The trial court however,

disregarded this, the sole evidence in the record, and in its place substituted an inaccurate interpretation of the wrong will, one completely at odds with Dr. Kimbrough's intent.

First, the trial court made a finding that Dr. Kimbrough' charitable intent was to further education and dental medicine at Washington University. (L.F. at 291.) The trial court then stated that Dr. Kimbrough in fact *established a fund* to support education and research in at Washington University in disciplines related to dentistry. (L.F. at 291.) Finally, the trial court stated that the trust had a general purpose to fund and support educational programs and projects in dental and medical fields at Washington University. (L.F. at 292.) There are several misstatements of fact and contradictions with the trial court's findings of these different purposes. First, Dr. Kimbrough did not establish any fund, although there is some evidence that he was an early contributor to the Dental Alumni Development Fund. That specific fund--the Dental Alumni Development Fund--was created by the Alumni of the Dental School as announced by the Dean of the Dental School. (Ex. 15.) Second, the Dental Alumni Development Fund was not meant to benefit Washington University, but the continuation of the Dental School and boost the morale and prestige of the School and its faculty. (Ex. 15.) It was not created to aid education at Washington University other than that provided by the Dental School, and there was no clause suggesting that the purpose of the Dental Alumni Development Fund was for research endeavors. To the contrary, there were other Funds to which Dr. Kimbrough could have made donations that provided for such endeavors and he chose not to do so. (Ex. 15; Tr. at 69-71, 191.) "If a gift is made to a particular institution, a court cannot authorize its application to an institution of an essentially different character,

because to do so might allow it to be applied to an object for which the testator did not intend that it should be used." Thatcher vs. Lewis, 76 S.W.2d 677, 682 (Mo. 1934); *citing* 11 C. J. 360 - 363, Section 77. Here, Dr. Kimbrough intended his gift to go to the Dental Alumni Development Fund for his Dental School. He used unambiguous and binding language that directed that it be used "exclusively" to benefit the Dental School. Washington University no longer has a dental school. It no longer confers degrees of dentistry, and there are no plans to reopen the Dental School. To find that Dr. Kimbrough had a general charitable intent and pass the trust corpus on to Washington University would turn Dr. Kimbrough's intent on its head by benefiting the same entity that dismantled his Dental School.

2. Dr. Kimbrough Was Enrolled in the Dental School Before It Was Part of Washington University and Spoke Only of The Dental School to His Relatives.

Dr. Kimbrough enrolled in the Dental School in 1890. (L.F. at 300; Ex. 5.) The Dental School was known as the Missouri Dental College at that time. Id. At that time, the Dental School had no affiliation with Washington University. Id. In 1892 the Dental School became affiliated with Washington University. Id. Dr. Kimbrough graduated from the Dental School in 1894. Id. Dr. Kimbrough also served on the faculty of the Dental School and he was a practicing dentist throughout his career. Id. One of the only two witnesses who personally knew Dr. Kimbrough testified that Dr. Kimbrough never spoke about Washington University. (Tr. at 57.) The only testimony as to Dr. Kimbrough's state of mind was that he spoke of the Dental School often and was proud

to be a dentist. Id. Dr. Kimbrough had no affiliation to Washington University, nor did he have any such affiliation to any other disciplines at Washington University, other than those related to the Dental School. This direct testimony regarding conversations with Dr. Kimbrough and his lack of any affiliation with Washington University generally, reflects that Dr. Kimbrough specifically intended to have his trust benefit the Dental School and that is why he restricted its use to the Dental Alumni Development.

3. The Timing of Dr. Kimbrough's Contributions to the Dental School Was in Response to the Dental School's Solicitation of Support From Their Alumni and is Evidence of His Specific Intent.

Dr. Kimbrough did not contribute to the Dental School for many years after his graduation. Only in the early 1950's did his contributions to the Dental School begin. This was during the time that the Dental School was actively soliciting yearly donations from its alumni. Time after time the Dental Journal printed notices and articles about Dental Alumni Development Fund raising activities and the moral obligation of alumni to support the Dental School. (Ex. 15.) It was in this environment of the Dental School calling out for help and when Dr. Kimbrough was well into his 80's that he began making contributions to the Dental School. Before this extensive fund-raising campaign, Dr. Kimbrough had not contributed to the Dental School. This one fact has been seen as a *crucial* factor that reflects a settlor's specific intent. In Re Estate of Coleman, 584, P.2d 1255, 1262 (Kan. Ct. App. 1978). Dr. Kimbrough was told that his alma mater was in financial trouble by the Dental Journal. He decided that he would revise his estate plan to leave the corpus of his trust to a Dental Alumni Development Fund that was to ensure the

continued existence of the Dental School. Dr. Kimbrough specifically intended to ensure the survival of the Dental School. When these extrinsic facts are considered they represent evidence of Dr. Kimbrough's specific intent.

4. Dr. Kimbrough's Lifetime Gifts for the Benefit of Various Recipients along with Contributions for the Benefit of the Dental School Are Evidence of His Specific Intent.

Dr. Kimbrough made eleven gifts during his lifetime. (Ex. A-L.) All of these gifts came after the formation of the Dental Alumni Development Fund-raising campaign that started during the beginning of the 1950's. To be sure, Dr. Kimbrough did make a few $100 donations that were not for the direct benefit of the Dental School. (Supp. L. F. at 80,-84.) One of these $100 gifts was even for the Medical School. Although most of the eleven life-time gifts were for the benefit of the Dental School, the important and persuasive evidence of the lifetime giving is that Dr. Kimbrough was cognizant of the funds and purposes available to him when he established his trust and used the unambiguous language: for the *exclusive use and benefit of its Dental Alumni Development Fund*.

The trial court erroneously found that gifts were extrinsic evidence of Dr. Kimbrough's general intent. (L.F. at 304.)

5. The Feelings of Other Alumni at the Time of Dr. Kimbrough's Trust Are Evidence That Dr. Kimbrough Specifically Intended to Assist the Dental School and Not Other Endeavors

Fellow alumni of the Dental School harbored negative feelings for the Medical School and Washington University as a whole. Dr. Gilster, an alumnus of the Dental School during the time that Dr. Kimbrough amended his trust, stated his feelings about the unfair treatment the Dental School received:

> It's been typical for years that medical schools look down to dental schools and that was very true and, actually, for many years I considered the medical school our enemy. They were taking over things and they were more supported by the University and they did not support the dental school….

(Tr. at 83-84.) Dean George G. Selfridge, former dean of the Dental School from September 1976 to January of 1987, stated that the Dental School was a reserve school. (Tr. at 353.) He testified that this meant that the Dental School received no support from Washington University and actually had to pay for all of its bills on its own. Id. Dean Selfridge stated that sometimes the Dental School would have to pay Washington University for certain services. (Tr. at 353-54.) Furthermore, Dean Selfridge stated that the faculty of the Dental School were aware that the Dental School was a reserve school and did not receive support from Washington University. (Tr. at 356.) Dr. Kimbrough was a former faculty member of the Dental School and would have been aware of the lack of support from Washington University. Additionally, the Washington University Dental Alumni Association changed their bylaws to exclude Washington University to receive their assets if the Association should ever cease to exist. (Tr. at 330.) This decision reflects the intent of an overwhelming number of Dental School alumni to not

allow Washington University to have their assets in the event that the Dental School closed. These feelings of other alumni of the Dental School against the Medical School and Washington University are further extrinsic evidence that Dr. Kimbrough would have wanted to benefit only the Dental School and no other endeavors.

C. The Trial Court Ordered the Distribution of Dr. Kimbrough's Trust Into Areas of Medicine for a New and Different Purpose than that which Dr. Kimbrough Intended.

The trial court created two areas to which the principal of Dr. Kimbrough's trust could be distributed. One was an endowed chair for the Washington University Department of Surgery and the other was an endowed chair for the Washington University Department of Otolaryngology. (L.F. at 305-06.) At trial Dr. Kim, a doctor with appointments in the Washington University Department of Plastic Surgery and the Washington University Department of Otolaryngology, testified that these two areas were not necessarily related to dental medicine. (Tr. at 140-42.) In fact, their relationship to dental medicine is strained at best. Furthermore, even though Dr. Kim has these appointments, he is not supported financially by Washington University.

Washington University presented two doctors with appointments in the Washington University Department of Plastic Surgery and the Washington University Department of Otolaryngology respectively. These doctors, Dr. Gay and Dr. Huebner, stated that they did not receive support from Washington University. (Tr. at 186-87, 298-99.) Furthermore, one of the dentists testified he not aware of or could not use charitable funds at Washington University whose explicit purpose was to benefit the work that they

were doing. (Tr. at 188, 191, 295.) One of these Funds, the John S. Swift Dental Alumni Development Fund was in existence at the time that Dr. Kimbrough amended his trust, and was for the treatment of malocclusions, a general condition that would include cleft palate repair. (Tr. at 295.)

In addition to unrelated medical practices, Washington University put forward an anthropologist and a librarian as viable alternatives, but the trial court did not order Dr. Kimbrough's trust to be used for those purposes. (Tr. at 237, 269.) Washington University has had the money it needs to fund and support the various endeavors that it now wishes to impose on Dr. Kimbrough's trust. Dr. Kimbrough never intended his trust to be used for the Medical School, for the treatment of malocclusions, or the Washington University general fund. There were alternatives to the Dental Alumni Development Fund available at the time that Dr. Kimbrough amended his trust if he had wanted to sponsor funds for other purposes, even other dental related purposes. Instead, Dr. Kimbrough chose to have his trust benefit the Dental Alumni Development Fund, to the exclusion of all other endeavors. This is further evidence of Dr. Kimbrough's specific intent to benefit the Dental School and also that Dr. Kimbrough did not intend to benefit Washington University, its Medical School, or anything other than his Dental School.

CONCLUSION

WHEREFORE, Appellants respectfully request that this Honorable Court order this case retransferred to the Court of Appeals of the Eastern District as, upon further consideration, it appears that the Transfer was improvidently granted, since there is no conflict in the circuits, and the opinion rendered in this case by the Eastern District of Court of Appeals is consistent with and not contrary to the decisions of this Court, or, in the alternative, reverse the Findings of Fact, Conclusion of Law, Judgment and Ukase of the Honorable Timothy J. Wilson, and enter the following orders:

1. As the Grantor Joseph B. Kimbrough created a valid charitable trust, and for the reason that it become impossible to fulfill the purpose of his trust, the trust fails, and as Grantor Joseph B. Kimbrough's charitable intent was specific, Plaintiffs are entitled to Judgment in their favor as a Matter of Law on their Count II for a Declaratory Judgment and Count III for the Construction of the Trust of their Amended Petition.

2. As the Grantor Joseph B. Kimbrough created a valid charitable trust which has become impossible to fulfill, the trust fails, and because the Court finds and determines that the Grantor Joseph B. Kimbrough's intent was specific, the doctrine of *cy pres* is inapplicable, and judgment is rendered against Respondents Washington University and Attorney General of Missouri and Intervenor Washington University Dental Alumni Association.

3. Respondent Bank of America is directed to proceed in its capacity of Trustee of Dr. Kimbrough's Trust and pay over the property constituting the trust estate

and distribute said property free from trust unto Appellants Louise Obermeyer and Elizabeth Salmon, as the remaining heirs of Dr. Joseph B. Kimbrough, OR in the alternative distribute said property free from trust unto Appellant Louise Obermeyer, as Personal Representative of Margaret Derrick's Estate, the residuary legatee under Dr. Joseph B. Kimbrough's 1962 Last Will and Testament so that Appellant Louise Obermeyer may distribute said trust corpus according to the terms of the Family Settlement Agreement signed by both Louise and Elizabeth. (L.F. at 240.)

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Appellants' Substitute Brief complies with the limitations set forth in Rule 84.06(b), contains 20,322 words, as counted by the word-processing software used, Microsoft Word, and that the disk filed together with this Brief in accordance with Rule 84.06(g) has been scanned for viruses and is virus-free.

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CERTIFICATE OF SERVICE

I hereby certify that one copy of Appellants' Substitute Brief and one copy of the disk required by Rule 84.06(g) were served by sending the same by U.S. Mail, postage prepaid to the following parties of record on this 8th day of January, 2004 by serving the attorneys listed below:

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